Eri Limited v Velji (Civil Appeal 57 of 2016)
[2022] KECA 97 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 97 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 57 OF 2016

PO KIAGE, K M'INOTI & M NGUGI, JJA

FEBRUARY 4, 2022

BETWEEN

ERI LIMITED ..... APPELLANT

AND

ZAINUL VELJI ..... RESPONDENT

(Appeal from the ruling of the Environment and Land Court at Kisumu (Kibunja, J) dated 27th April, 2016 in Kisumu HCCC No. 143 of 2004)

JUDGMENT

1. The dispute ultimately giving rise to this appeal has a long history. The respondent had filed Kisumu High Court Civil Suit No. 143 of 2004 (hereafter 'HCCC No. 143 of 2004') in which she sought vacant possession of L.R. No. Kisumu/Municipality Block 3/92, general damages for trespass, mesne profits and the costs of the suit against the appellant. The respondent had purchased the suit property at a public auction following the appellant's failure to repay a loan, and the chargee had exercised its statutory power of sale. The appellant had filed a defence and counter claim in which it alleged that the suit property had been illegally transferred to the respondent.

2. Pursuant to an application by the respondent, the court (Nambuye J, as she then was), in a ruling dated 1st August 2011, allowed the respondent's application and struck out the appellant's defence and counterclaim. An application to this Court under Rule 5(2)(b) of the *Court of Appeal Rules* for stay of the decision of the High Court pending appeal was dismissed. On 30th April 2012, the respondent obtained eviction orders against the appellant.

3. The record of proceedings before the High Court indicates that pursuant to a consent entered into between the appellant and the respondent on 4th June 2012, the parties agreed to extend time for the appellant to vacate the suit premises to 15th July 2012. On 2nd July 2012, however, the appellant filed Constitutional Petition No. 4 of 2012 alleging that it had been denied a fair hearing in HCCC No.

143 of 2004. On 5th July 2012, the High Court granted interim orders staying execution of the eviction orders against the appellant pending hearing and determination of the Petition. The High Court heard the Petition and in its ruling dated 21st December 2012, dismissed it with costs to the respondent. Following the dismissal of the Petition, the respondent obtained eviction orders dated 27th December 2012, against the appellant.

4. Undaunted, the appellant then moved to the High Court in HCCC No. 143 of 2004 and filed an application dated 29th January 2013, in which it sought the following orders:

   a) That the order of this court issued on the 27th December 2012 courtesy of the judgment delivered in KISUMU HIGH COURT CONSTITUTIONAL PETITION NO. 4 OF 2012 be hereby reviewed.

   b) That the resultant eviction of the Appellant from the suit premise KISUMU MUNICIPALITY/BLOCK 3/92 be quashed and the applicant be restored to occupation.

   c) That the costs of the application be awarded to the applicant.

5. The application was premised on the grounds that the order issued on 27th December 2012 in favour of the respondent was based on a judgment delivered on 21st December 2012 in relation to the application dated 5th July 2012, while no such judgment exists in Kisumu Constitutional Petition No.4 of 2012. Further, that the absence of a written, signed and pronounced judgment means new and important evidence had been found to demonstrate that the order extracted could not stand. Finally, that it was in the interests of justice that the resultant eviction be quashed.

6. The application was supported by an affidavit sworn by Rasik Lavji Sanghrajka, a director of the appellant, on 29th January 2013. His deposition was that the appellant had filed Petition No.4 of 2012 to assert its right to a fair hearing in relation to the court's ruling dated 1st August, 2011. The appellant had then filed an application dated 5th July, 2012 which sought to stay the execution of the decree out of the ruling of 1st August 2011 and stay orders were issued on 12th July, 2012 pending the ruling on 21st December, 2012.

7. Mr. Sanghrajka further averred that the judge seized of the Petition had, on 21st December, 2012, stated in court that the Petition had failed with costs to the respondent as the petitioner had been granted a fair hearing. The judge had further asked the parties to obtain copies of the ruling from the registry. The appellant's Counsel had not been able to obtain a 'written and signed pronounced' judgment from the registry and therefore none exists. The orders of eviction issued on 27th December 2012, were thus obtained unprocedurally and by deceit.

8. The respondent opposed the application by way of an affidavit sworn on 4th February, 2013 by her Counsel, David Otieno. He deposed that the ruling in Petition No. 4 of 2012 was read on 21st December 2012, dismissing the Petition, and the natural consequence of the dismissal was that the order of stay granted earlier pending the delivery of the ruling lapsed.

9. Counsel further deposed that the Court had given an eviction order on 30th April 2012 and the extended time for the appellant to give vacant possession had expired on 15th July 2012 and thus the eviction was lawfully done. The appellant had not appealed against the ruling delivered on 21st December 2012 or obtained an order to maintain the status quo. There was therefore no order made on 27th December 2012 that was capable of being reviewed.

10. In its ruling dated 27th April 2016, the trial court identified two main issues for determination. The first was whether the appellant had established the existence of new and important matter or evidence

that was not within its knowledge, that would justify a review of the order. The second was whether there exists a written signed and pronounced judgment dated 21st December 2012 in Kisumu HCCC No. 4 of 2012 and its relation to the order issued on 27th December 2012. Upon analysis of the two issues, it held that the appellant's defence and counterclaim had been struck out on 1st August 2011; that the respondent had been allowed to set down the suit for formal proof in respect of her prayers for damages and mesne profits; and that her prayer for vacant possession had been granted and was awaiting the respondent to move the court for execution through extraction of a decree.

11. The trial court further found that the parties had, by consent, settled the decree among whose terms was that the appellant would give vacant possession to the respondent. A court order had been issued giving the appellant 14 days to vacate the suit premises. That following the appellant's application dated 10th May 2012, the parties had appeared before the Deputy Registrar on 4th June 2012 and a consent was entered into extending time for the appellant to vacate the suit premises to 15th July 2012.

12. The trial court noted that before the time for vacating the suit premises came, the appellant filed Constitutional Petition No. 4 of 2012 in the High Court seeking a declaration that the proceedings in HCCC No. 143 of 2004 were inconsistent with the right to a fair hearing under Article 50(1) and (4) and 160(1) of the *Constitution*. The High Court had issued orders of stay of eviction of the appellant on 12th July 2012. It had heard the Petition and delivered a ruling dated 21st December 2012, dismissing the Petition.

13. The trial court noted that the judgment dated 21st December 2012, a copy of which the appellant had annexed to its affidavit sworn on 14th March 2013, was not in contravention of Order 21 of the *Civil Procedure Rules*. It was also not amenable to review by the court seized of HCCC No. 143 of 2004. Its conclusion was therefore that the Petition having been dismissed, the orders issued on 12th July 2012 automatically lapsed. The respondent was therefore entitled to seek eviction orders in terms of the court orders issued on 30th April 2012 and extended by consent on 4th June 2012.

14. The court further concluded that the appellant had not complied with the requirements of Order 45 on review, as there were no facts disclosed to enable the court to review the eviction orders issued on 27th December 2012, which were extracted and issued in accordance with the procedures of the court.

15. Regarding the appellant's complaint that the respondent's affidavit in opposition to its application had been sworn by her counsel, the trial court found that as the application before it was an interlocutory application, there was no prejudice occasioned to the appellant by Counsel for the respondent swearing the affidavit in reply, as there were no contentious issues raised in the affidavit. Finally, the trial court found that the absence of a handwritten ruling or judgment did not vitiate the legality of a typed ruling or judgment that has been dated, signed and delivered by the court. It accordingly dismissed the application with costs to the respondent.

16. The appellant was dissatisfied with the decision of the trial court and has filed the present appeal in which it raises six grounds of appeal in the Memorandum of Appeal dated 7th July 2016 as follows:

    1. The learned judge of the High Court erred in law by failing to find that the respondent obtained the judgment by fraud.

    2. The learned judge of the High Court erred in law by failing to observe that an order could not be retrieved in the absence of a ruling in the High Court file.

    3. The learned judge of the High Court erred in law and in fact by failing to find that the respondent's replying affidavit dated 4/2/2013 ought to have been expunged for being sworn by counsel.

4. Further the learned judge erred in failing to find that the application dated 29/01/2013 sought final orders quashing the order of eviction.

5. That the learned judge of the High Court misdirected himself in law by failing to appreciate that the respondent had misled the court on factual issues.

6. The ruling was inconsistent with the evidence tabled by the Appellant.

17. In its written submissions dated 2nd September 2019, the appellant does not address itself to the above grounds of appeal. It submits, first, that in writing its ruling dated 27th April 2016, the trial court did not have a look at the letter in the file dated 18th January 2013 which had handwritten remarks by the Deputy Registrar and Chemitei, J which were to the effect that 'the file' was to be kept in Justice Aroni's chambers. It contends that this was a confirmation that the file in respect of Petition No 4 of 2012 was not in court and the appellant therefore filed its application dated 29th January 2013 in the file for HCCC No. 143 of 2004. The said letter had not received a response from the court but was placed back in the file.

18. The appellant further submits that it had filed the application dated 29th January 2013 under certificate of urgency; that the application was certified urgent and set for hearing on 4th February 2013; that despite certifying the application urgent, the court kept on giving dates for mention for further directions as he could not make a move since the file for Petition No: 4 of 2012, to which the application refers, was not available in the registry; and that this fact is confirmed by the remarks on the letter dated 18th January 2013. The court was unable to proceed with the matter and kept on issuing mention dates and referring the matter back to the registry as the file for Petition No. 4 of 2012 was not available until 20th February 2013 when the file appeared and the judge referred the matter to the registry for mention before the judge on 14th March 2013.

19. According to the appellant, the proceedings for the period 30th January 2013 and 28th February 2013 are not in the file; that there is no mention of the said proceedings for this period in the ruling delivered on 27th April 2016; and that such proceedings would have been very vital in the ruling if they had been incorporated. The appellant submits that in the ruling the subject of this appeal, the court stated that the record for Constitutional Petition No. 4 of 2012 was not furnished to it. The appellant contends that it was incorrect for the court to state that the proceedings were not available as they had been furnished as annexure RLS 6 in the Further Affidavit sworn on behalf of the appellant on 11th February 2016.

20. The appellant argues that this Court has the jurisdiction to offer a remedy when an allegation of fraud is made. In support of this submission, the appellant cites, without giving the full citation, the case of *Flower v Floyd (C.A. 1877) Law Reports, Ch D* in which, according to the appellant, thecourt held that in the case of a decree or judgment being obtained by fraud, there was always power in the courts of law to give adequate relief.

21. While reiterating the orders it had sought in the application dated 29th January 2013, the appellant submits that it had explained its grounds for instituting the claim; that it had cited the error made by the court, namely that the eviction order against it was based on a judgment delivered on 21st December 2012 when there was no written, signed and pronounced judgment on the application dated 5th July 2012 in Constitutional Petition No. 4 of 2012; and that in the absence of a written and signed pronounced judgment, the order extracted was not sufficient to give rise to the orders leading to its eviction.

22. The appellant submits that the ruling in the Petition was not delivered as scheduled but was delivered on 21st December 2012 during the court's vacation period; that the court 'purported to deliver a one sentence judgement that the petition must fail with costs to the respondent'; that this violated the stipulations of Order 50 Rule 4 of the Civil Procedure Rules with respect to the computation of time for the amending, delivering or filing of any pleading or the doing of any other act; that the court gave no reasons for delivering the judgment during this period, and in its view, this rendered the judgment invalid.

23. According to the appellant, the respondent purported to have extracted an eviction order dated 30th April 2012 and issued on 27th December 2012 based on the said judgment. In its view, the said eviction order was acquired unprocedurally and should be reviewed and set aside, the respondent having obtained it on 27th December 2012 based on the file for HCCC No. 143 of 2004 without informing the Deputy Registrar about Petition No 4 of 2012. The appellant contends that this was so because the file on the said Petition was still in the judge's chambers, a fact of which the respondent did not inform the Deputy Registrar. Had the Deputy Registrar been informed of this fact, he would not have issued the orders on 27th December 2012.

24. The appellant submits that it had demanded certified copies of the handwritten judgment in Petition No. 4 of 2012, and the Deputy Registrar hadconfirmed in the letter dated 7th April 2014 that a handwritten judgment was non-existent. The appellant submits that "the fact of the missing of the handwritten judgement from the file creates a huge doubt as well as invalidity in the face of law and anything to do with the said judgement." According to the appellant, in the absence of the 'handwritten judgment' everything else done pursuant to the judgment, including the eviction order against it, should be reversed.

25. The respondent's Advocates filed submissions in opposition to the appeal dated 29th January 2020. The respondent notes that the trial court had recapped and summarized the facts of the case material to the application before it and had made various conclusions in its ruling. The respondent observes that the appellant had deliberately left out of the record of appeal portions of the proceedings which it considered were not favourable to its case. She submits in this regard that there were proceedings on 29th September 2011 for the settlement of the terms of the decree, and that the parties hereto had agreed on the said terms. Further, that on 4th June 2012, a consent was recorded extending time for the appellant to vacate the suit premises. While the appellant had, in its Supplementary Record of Appeal, placed before the court some of the proceedings that it had left out, it had deliberately omitted the proceedings in which it had consented to the settlement of the terms of the decree and its consent to giving vacant possession to the respondent.

26. In responding to the appellant's grounds of appeal, the respondent notes that the appellant had contended that the trial court should have found that the respondent obtained the judgment by fraud. The respondent submits that it is not clear what judgment the appellant is referring to in this ground. If, however, the reference is to the judgment dated and delivered on 21st December 2012 in Constitutional Petition No. 4 of 2012, that ground of appeal is misconceived.

27. The respondent submits that the trial court was correct in finding that the appellant's application was a challenge to the ruling in Constitutional Petition No. 4 of 2012; that the said ruling could not be challenged before the trial court as it had been given by a court of co-ordinate jurisdiction; and that the forum for challenging such a decision was to this Court. From the affidavits that the appellant had filed before the trial court, its complaint was about something that happened or did not happen in Constitutional Petition No. 4 of 2012, and it could not approach the trial court to complain about a decision of a court of co-ordinate jurisdiction.

28. To the appellant's imputation that the respondent had obtained the order issued on 27th December 2012 by fraud, the respondent submits that other than complaining in the wrong forum, the suggestion by the appellant is that the judgment dated 21st December 2012 dismissing the Petition did not dismiss the interlocutory application. The respondent submits that once a suit is dismissed or struck out, an interlocutory application filed within it cannot remain outstanding. Once the court dismissed Constitutional Petition No. 4 of 2012 on 21st December 2012, the interlocutory orders issued on 12th July 2012 within the Petition automatically lapsed. The respondent was therefore entitled to apply for execution of the eviction order.

29. Regarding the appellant's complaint in its third ground of appeal that her replying affidavit was incompetent for having been sworn by her Advocate, the respondent submits that her Advocate relied almost entirely on what was on record in opposing the application; that the facts put forward in the replying affidavit were uncontested; and that the trial court was right in finding that the notice of motion was an interlocutory application and there was nothing wrong with Counsel swearing the replying affidavit on behalf of the respondent as this was permitted in Order 19 of the *Civil Procedure Code*. The respondent therefore urged the court to dismiss the appeal with costs.

30. We have considered the record of the trial court, the ruling appealed against, the appellant's grounds of appeal and the submissions of the parties on the appeal. As we observed earlier in this judgment, in its written submissions, the appellant does not address the grounds contained in its Memorandum of Appeal filed before us. Instead, it presents a somewhat convoluted series of complaints that one is left a little puzzled as to what, precisely, the appellant is appealing against: is it really the ruling of Kibunja, J dated 27th April 2016, the ruling of Aroni, J dated 21st December 2012, or even the ruling of Nambuye, J dated 1st August 2011?

31. The fact, though, is that this appeal is expressed to be brought against the decision of Kibunja, J dated 27th April 2016 in HCCC No. 143 of 2004. That decision was rendered pursuant to an application by the appellant seeking review of the orders of the court issued in that suit on 27th December 2012 for its eviction from the suit premises. In order to address ourselves to the appeal therefore, it is useful to recap, for clarity, how the parties got to the orders issued on 27th December 2012.

32. The respondent had filed suit for vacant possession of the suit premises which she had bought pursuant to the appellant's failure to repay a loan. The appellant had filed a defence and counterclaim. Its defence and counterclaim had been struck out on 1st August 2011. The parties had settled the decree on the suit on 29th September 2011, one of whose terms was the granting of vacant possession by the appellant. The appellant had failed to abide by the terms of the decree, and an eviction order had been issued on 30th April 2012. An application by the appellant dated 10th May 2012 had been settled by a consent order on 4th June 2012 by which the period for the appellant to give the respondent vacant possession of the suit premises was extended to 12th July 2012. So far so good.

33. But then the appellant got a brainwave. It filed Constitutional Petition No. 4 of 2012 on 2nd July 2012 alleging that the orders striking out its defence and counterclaim made on 1st August 2011 were in violation of its rights to a fair hearing. It was granted interim orders on 12th July 2012 staying execution of the eviction orders. The eviction orders would have been executed, pursuant to the consent orders entered into on 4th June 2012 in HCCC No. 143 of 2004, upon its failure to vacate the suit premises on 15th July 2012.

34. Constitutional Petition No. 4 of 2012 was heard and in the decision dated 21st December 2012, dismissed. Pursuant to the dismissal, the respondent obtained eviction orders dated 27th December 2012 in HCCC No. 143 of 2004. The appellant devotes a significant portion of its submissions before

us in a not too well disguised attack on the court seized of Constitutional Petition No. 4 of 2012. First, that the court delivered its ruling on 21st December 2012 which, in the appellant's view, was in violation of the provisions with respect to computation of time set out in Order 50 of the Civil Procedure Code. The appellant has not demonstrated how Order 50 is applicable to the delivery of judgments and rulings.

35. The appellant submits, secondly, that there was no 'written, signed and pronounced judgment' on the basis of which the eviction orders of 27th December 2012 could issue. This is a somewhat puzzling submission. The appellant attached to its affidavit sworn on 14th March 2013 by its Director, Rasik Lavji Sanghrajka the decision in Constitutional Petition No. 4 of 2012 by which the court dismissed the Petition. It is not clear what other 'written, signed and pronounced judgment' the appellant required.

36. The appellant muddles things further, however, by now introducing the argument that a handwritten judgment in Constitutional Petition No 4 of 2012 was non-existent. It submits that it had demanded certified copies of the handwritten judgment in Petition No. 4 of 2012, and the Deputy Registrar had confirmed in the letter dated 7th April 2014 that a handwritten judgment was non-existent. In the appellant's view, "the fact of the missing of the handwritten judgement from the file creates a huge doubt as well as invalidity in the face of law and anything to do with the said judgement." If we understand the appellant correctly, there should have been a handwritten judgment in the court file on Constitutional Petition No. 4 of 2012. The fact that there was no such judgment rendered the decision of the court invalid.

37. One is at pains to find judicious words to answer this peculiar argument on the part of the appellant. In its ruling dated 27th April 2016, the trial court observed:

> "k) That the absence of a handwritten ruling or judgment does not vitiate the legality of a typed ruling or judgment that has been dated, signed and delivered by the court. The use of technology ensures the attainment of the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of the disputes before the court is attained as the parties will readily access typed copies soon after delivery of the ruling or judgment."

38. On our part, we would be hard pressed to recall when, if ever, in these days of digitization and ICT, we have heard a party challenge the validity of a judgment because there was no 'handwritten' judgment or ruling. Even where courts deliver ex tempore rulings and orders, where such rulings may be in the hand of the court, such decisions are almost immediately typed and made available on the file or online. This argument by the appellant as a basis for challenging either the ruling dated 27th April 2016 or the ruling dated 21st December 2012 in Constitutional Petition No. 4 of 2012 really is totally untenable.

39. In any event, we are satisfied that the trial court did not err in declining to review the orders issued on 27th December 2012 in HCCC No. 143 of 2004 for eviction of the appellant. As the trial court correctly held, it had no jurisdiction to deal with any grievance that the appellant had arising from the decision in Constitutional Petition No. 4 of 2012. Secondly, the temporary orders issued in the said Petition had lapsed upon dismissal of the Petition.

    Thirdly, the orders issued on 27th December 2012 were a natural follow-up on the dismissal of the Petition: since there were no interim orders restraining the execution of the eviction orders issued on 30th April 2012, and since the time for the appellant to vacate the suit premises agreed on by consent on 4th June 2012 had expired on 15th July 2012, there was no legal reason to prevent the respondent from applying for and obtaining eviction orders in terms of the decree settled between her and the appellant on 29th September 2011.

40. In the result, we find that the present appeal has no merit. It is, as submitted by the respondent, yet another attempt to deny her the fruits of the judgment in her favour. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR